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the State consents to the suit; that the matter is without the State sovereignty; that the officer is not protected by a lawful authority, or has disregarded a lawful authority when no discretion is attached.¹¹

The facts of the present principal case were within the sovereign acts of the State, the suit was against the State acting in its sovereign capacity and attempted to control a lawful discretion of the officers of the State, any of which would prevent the jurisdiction against the consent of the State.

LAND DAMAGES FOR CHANGE OF GRADE IN PENNSYLVANIA.

The case of *Jamison v. Cumberland County*, 39 Pa. Super. Ct. 335, while a brief *per curiam* decision, suggests the possibility that the recent legislation in Pennsylvania for the improvement of highways may have opened up a new field of operations for the land damage claimant with the incidental result of depleting State, county and township treasuries. The Act of May 1, 1905, P. L. 318, which provides for the improvement of the highways at the joint expense of the State, county and township, contains in Section 16 a provision that the Commonwealth shall not be liable for damages arising from the rebuilding or improvement of highways under the act. But "in case any person or persons, or corporations, shall sustain damage by any change in grade, or by the taking of land to alter the location of any highway which may be improved under this act, and the county commissioners and the parties so injured cannot agree on the amount of damages sustained, such persons or corporations may present their petition to the Court of Quarter Sessions for the appointment of viewers to ascertain and assess such damage; the proceedings upon which said petition and by the viewer shall be governed by the laws relating to the assessment of damages for opening public highways, and such damages, when ascertained, shall be paid by the respective counties, and afterwards apportioned by the State Highway Commissioner according to the provisions of section fifteen."

This section was amended by the Act of June 8, 1907, P. L. 505, so as to read in the same way except that the words "by any change of grade" were omitted. The decision of *Jamison v. Cumberland County* is the obvious one that the Act of 1907 repealed the Act of 1905 in so far as it related to damages for

¹¹ *Fitts v. McGhee*, 172 U. S. 516 (1899); *Ex parte Young*, *supra*.

change of grade, and hence a petition for the appointment of viewers to assess damages for a change of grade in a highway improved after the passage of the Act of 1907 must be dismissed. The Court, however, uses these significant words: "The case is not the same as if the appellant were left without any remedy whatever." In other words, the Legislature not having provided a remedy to enforce the constitutional right to damages, the right may be enforced by action at law.

Prior to the passage of the recent highway improvement acts the care of public roads was a matter for the township and it has been held that the township was not liable in damages to property owners along the line of a public road for a change in the grade for the improvement of public travel. A township was not such a corporation as is contemplated by article 16, section 8 of the Constitution of Pennsylvania, imposing liability on municipal and other corporations for consequential damages to private property injured but not actually taken in the construction of their works. *Shoe v. Nether Providence Township*, 3 Super. Ct. 137; *Wagner v. Salzburg Township*, 132 Pa. 636; *Winner v. Graner*, 173 Pa. 43.

On the other hand, a county has been held to be within the meaning of article 16, section 8 of the Constitution and liable for consequential damages to private property injured but not actually taken in the erection of a county bridge. *Chester County v. Brower*, 117 Pa. 647. The road improvement act, as seen above, imposes liability for damages primarily upon the county, subject to an apportionment between the Commonwealth and township, and, it would seem, the mere fact that viewers cannot be appointed in change of grade cases will not relieve the county from liability in an action of trespass under the Constitution.

Aside from the Constitution, neither the Commonwealth nor other municipal division through which a road passes is liable to the land owner for damages until made so by law. In every grant of lands by the proprietaries or the Commonwealth, from the earliest times, an allowance of six per cent. additional was made for roads, so that the owner of land taken for the purposes of a road has no right to compensation for the land itself, but only for the improvements, unless such a right was expressly conferred by statute. *McClenachan v. Curwin*, 3 Yeates, 362.

As the maintenance of highways, after their opening, is the statutory duty of the township supervisors, no liability is imposed upon these officers or the township for grading incidental

to the proper maintenance of the roads. They are public officers charged with the care of the highways, exercising powers defined by statute, and cannot be held answerable for the consequences of their acts unless they deviate from the line of the highway and commit a trespass. *Yealy v. Fink*, 43 Pa. 212; *McCormick v. Kinsey*, 10 Pa. Super. Ct. 607; and this is in accord with the English decisions: *The Governor and Company of the British Cast Plate Manufacturers v. Meredith*, 4 Term Rep. 794; *Sutton v. Clark*, 6 Taunt. 29; *Leader v. Moxton*, 3 Wilson, 461; *Boulton v. Crowther*, 1 Barn. & Cress. 703.

In the last case, Littledale, J., says: "But where an Act of Parliament vests a power in trustees or commissioners to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of that power, the Legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from an act so done for the public benefit."

Little hardship has resulted from this rule in the case of township roads since changes of grade in the country districts seldom entail much damage upon adjoining owners. By making improved roads county roads, and imposing the principal duties in connection with their improvement upon the county officers, a new and probably unsuspected course of litigation is discovered. However, the recent Act of May 13, 1909, P. L. 527, seems to mark a change in the policy of the Legislature in the direction of relieving the counties of the State from the burden of highway management. This act, in amending section 1 of the act of April 22, 1905, provides that public roads established and improved by the counties shall thereafter be maintained and improved by the proper township or borough.

The experience of our cities with exorbitant demands for damages by reason of changes of grade should warn the authorities against extending this principle to country roads, and while the country juror is less liberal than his city cousin, nevertheless there is always a temptation to make an award in favor of a claimant when the money does not seemingly come from one's own pocketbook. Only in very special cases should damages be allowed for change of grade where the land is in its natural state, and then only under the strictest supervision of the Court.